IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2203 OF 2005

Shri.Farsheed Burjor Patel. ...Petitioner.

Vs.

Shri.Ismail Ibrahim Waikar & others. Respondents.

Mr.A.V.Anturkar, for Petitioner.

Mr.V.G.Mujumdar, for Respondents.

CORAM: D.K.DESHMUKH,J.

DATED: 31st August, 2005.

P.C.:-

1. Rule. By consent made returnable forthwith. By consent of parties taken up for final hearing.

2. The Appeal Court by the order impugned in the petition, has set aside the order passed by the Trial Court rejecting the

application for temporary injunction filed by the Respondents, and has granted temporary injunction in favour of the Respondents who are the Plaintiffs. By that order, the Appeal Court has restrained the petitioner from taking possession of the suit property from the plaintiffs. The prayer clause of the suit shows that the plaintiffs are claiming decree of declaration of their title and they are claiming order of permanent injunction restraining the defendants from taking possession of the property from the plaintiffs. The case of the petitioner who is original defendant no.1 in that suit is that the plaintiffs have encroached upon the land and had made construction. For the removal of the encroachment the defendant no.1/petitioner had approached the Tahsildar. The Tahsildar after getting the land measured, by order dated 20.2.2002 held that the plaintiffs have encroached upon the land and has directed removal of the encroachment. That order has been challenged by the Respondents by filing appeal before the Sub-Divisional Officer, Wai. That appeal has been disposed of. According to the plaintiffs, the suit has been filed under Section 138 of the Maharashtra Land Revenue Code. Perusal of Section 138 of the Act shows that the Revenue authority can determine the proper position of the boundary and can also determine the rights of the landholders on either side of the boundary. Sub-Section (2) of Section 138 of the Act permits the Collector to remove the persons who are found to be in possession of the land not

belonging to them. Sub-section (3) of Section 138 of the Act provides that an order of ejectment made by the Collector under sub-section (2) shall be subject to appeal and revision and shall be also subject to the provisions of sub-sections (4) and (5) of Section 138 of the Act. Perusal of the sub-section (4) of Section 138 of the Act shows that any person who has been ejected or is about to be ejected from any lands under the provisions of sub-section (2), can institute a civil suit to establish his title to the land. But to such a suit neither the Collector can be joined as a party nor the State Government can be joined as a party. Sub-section (5) of Section 138 of the Act provides that if a Civil suit is filed then any appeal or revision against the order to which the Civil Suit relates do not lie. Thus, a Civil suit in effect challenging the order passed under sub-section (2) of Section 138 of the Act is maintainable. Even if it is assumed that it is the order of Tahsildar made under Section 138 of the Act which is challenged in the suit then also the most that can be said is that the Civil suit filed by the plaintiffs is maintainable. But the real question is in such a situation whether the Civil Court can totally ignore the order passed by the Revenue authority under Section 138 of the Act and make the order of temporary injunction which nullifies the order of Tahsildar. What is pertinent to note here is that the order of Tahsildar contemplates removal of the plaintiffs from the land by the Tahsildar. But in the Civil Suit no permanent injunction against the Tahsildar is claimed, even a

temporary injunction is not claimed against the Tahsildar. In terms of the order of Tahsildar, there is no question of petitioner removing the plaintiffs from the land. In my opinion, as the order of the Tahsildar was made after taking measurement of the land and as it is the order made in regular course of business by the Tahsildar, the order at prima facie stage at least deserves to be given weightage and the Civil Court should have proceeded to accept the findings recorded by the Tahsildar in that order. The appeal court ought not to have made order which nullifies the total effect of the order made by the Tahsildar. In my opinion, the appeal court has totally abused the discretion vested in him in making the order of temporary injunction. In the result, therefore, the petition succeeds and is allowed. Rule is made absolute in terms of prayer clause (a).

The respondents to pay costs of this petition to the petitioner as incurred by the petitioner.

At this stage a request is made for stay of the order. I find no justification in accepting that request. Hence, the request is rejected.